IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL REVISION APPLICATION NO.260 OF 2005

Mohd. Imran Abdul Majid Ansari ...Applicant

vs.

The State of Maharashtra ...Respondent

Mr.P.R.Dave for the Applicant
Mr.K.V.Saste, A.P.P. for State

CORAM: A.S.OKA,J.
DATE : AUGUST 25,2005

P.C.:

1. Rule. The learned A.P.P. waives service. Heard learned Advocate for the Applicant and the learned A.P.P. for State. The Applicant has been convicted for offence punishable under Section 377 of the Indian Penal Code. The learned Magistrate convicted the Applicant and sentenced him to suffer simple imprisonment for two years and to pay fine of Rs.5,000/- and in default of payment of fine, a simple imprisonment for two months. An Appeal was preferred by the Applicant to the Sessions Court. Though the conviction was confirmed by the Sessions Court, substantive sentence was reduced to six months. The victim of the heinous offence is an eleven years old girl.

2. The learned Advocate for the Applicant submitted that no reliance can be placed on the evidence of the victim as in her examination-in-chief she has not supported the prosecution.

He submitted that the learned Magistrate committed illegality by allowing the Public Prosecutor to cross examine the victim without declaring her hostile. He submitted that P.W.No.2 being a child witness was always vulnerable to the tutoring and therefore, her evidence cannot be the basis of conviction. He submitted that in the deposition of the father of the victim, he has stated that the offence was committed in the morning. He pointed out that the version of the victim is contradictory. According to the version of the victim, the incident took place in the evening. He, therefore, submitted that the entire prosecution case deserves to be disbelieved. Lastly, he submitted without prejudice to his earlier contention that the Applicant is a handicapped person who has already undergone a sentence for more than one month and therefore relying upon the decision of the Supreme Court reported in 1975 Cr.L.J. page No.30 (Chitranjan Dass Vs. State of U.P.), he submitted that the sentence be reduced to one which is already undergone.

3. The learned A.P.P. submitted that there are concurrent findings recorded by the Courts and no interference is called for in a revisional jurisdiction.

4. I have considered the submissions. In a revisional jurisdiction, it is not open for this Court to re-appreciate the evidence. However, the learned Advocate submitted that

the admissions made by the victim him go to the root of the matter and therefore, I have considered the oral evidence. It will be necessary to refer to the evidence of P.W.No.2. In paragraph No.2 of her evidence, she has stated that while she was playing hide and seek game, she was hiding inside the telephone booth of the Applicant-accused. She has stated that the Applicant made her sit on his lap and this was seen by one Santosh. She stated that the accused told the said Santosh that he would pay by him and the incident should not be disclosed. According to her version she told the said Santosh what transpired in the booth. She stated that she had disclosed the incident to his father and his father went to the Police station. Before commencing the recording of her evidence, the learned Judge has noted that the evidence was recorded in-camera. He has also noted that he was satisfied that the witness was aware that she was required to tell the truth on oath. Therefore, he administered oath. After recording some examination in chief, on the request made by the Prosecutor, he permitted the Prosecutor to cross examine the witness without declaring her hostile. In paragraph No.3 of her deposition the witness has stated thus :

"3. It did happened that he given his penis in my hand and then put his penis also in my mouth. When Santosh came the accused left me."

4A. It will be necessary to refer to the decision of the Apex Court reported in A.I.R. 1976 S.C. page no.294 (Sat Paul Vs. Delhi Administration). The Apex Court was dealing with the power of the Court under Section 154 and 155 of the Indian Evidence Act. While dealing with the power under Section 154, the Apex Court held thus :

"37. To steer clear of the controversy over the meaning of the terms "hostile" witness, "adverse" witness, "unfavourable" witness which had given rise to considerable difficulty and conflict of opinion in England, the authors of the Indian Evidence Act, 1872 seem to have advisedly avoided the use of any of those terms so that, in India, the grant of permission to cross examine his own witness by a party is not conditional on the witness being declared "adverse" or "hostile". **Whether it be the grant of permission under Section 142 to put leading questions, or the leave under Section 154 to ask questions which might be put in cross examination by the adverse party, the Indian Evidence Act leaves the matter entirely to the discretion of the court. (see the observations of Sir Lawrence Jenkins in Baikuntha Nath Vs. Prasannamoyi) AIR 1922 PC 409. The discretion conferred by section 154 on the court is unqualified and untrammelled, and is apart from**

any question of "hostility". It is to be liberally exercised whenever the court from witneses' demeanour, temper, attitude, bearing, or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice. The grant of such permission does not amount to an adjudication by the court as to the veracity of the witness. Therefore, in the order granting such permission, it is preferable to avoid the use of such expressions, such as "declared hostile", "declared unfavourable", the significance of which is still not free from the historical cobwebs which, in their wake bring a misleading legacy of confusion, and conflict that had so long vexed the English Courts."

(Emphasis supplied)

5. In paragraph No.51 of the said decision the Apex Court held thus :

"51. **From the above conspectus, it emerges clear that even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off**

> **the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be credit-worthy and act upon it,** If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should as matter of prudence, discard his evidence in toto."
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> (Emphasis supplied)

In another decision of the Apex Court reported in A.I.R. 1977 S.C. page 170 (R.K.Dey Vs. State of Orissa), the Apex Court held that a party will not normally be allowed to cross examine its own witness declaring him hostile, unless the Court is satisfied that the statement of the witness exhibits element of hostility or that the witness has resiled from a material statement which he had made before the Police. The

Apex Court however held that cross examination is permissible where the Court is satisfied that witness is not speaking the truth and it may be necessary to get out the truth by cross examining him. The Apex Court held that even in a case where the witness is declared hostile by the party calling him and the said party is allowed to cross examine the witness, that by itself does not make the witness unreliable for consideration altogether. The evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by a reliable evidence. In the present case, it is obvious from the deposition that the learned Judge found that the child witness was hesitating to tell the truth, with a view to bring the truth on record, the learned Judge permitted cross examination of the said witness without declaring the witness as hostile. The learned Judge noted that the father of the girl was stating that he does not want to proceed. The witness has thereafter clearly deposed about commission of unnatural act by the Applicant constituting offence under section 377 of I.P.C.

7. This is a case where another child witness Santosh has corroborated the version of the P.W.No.2 to a great extent. The said witness has stated in examination-in-chief as under :

"....Hence we children from Ambedkar Nagar play in front of cuffe parade police station on the open ground.

> On that date of incident in the evening at about 7.00 p.m. or so I alongwith Marimbi and other four to five boys from our locality were playing hide and seek on the open ground in front of cuffe parade Police Station. At the relevant time, the other children had hide themselves and I was seeking them. I was searching Marimbi. I saw Marimbi in the telephone booth of the accused. Accused was present there in the telephone booth. He was sitting on the chair. Marimbi was sitting in front of the accused. I saw that accused had put his penis in the mouth of Marimbi, I went in the booth. Accused told me not to disclose this fact to anybody or he would beat me. Accused then left Marimbi. She then went home."

8. In fact the said witness has corroborated the version of P.W.No.2 of its material particulars including the approximate time when the offence has been committed. It is true that the evidence of a child witness is required to be evaluated carefully because he is an easy prey to tutoring. It must be remembered here that it is a case involving sexual molestation of a minor girl. Therefore, different yardstick will have to be applied to the evidence of P.W.No.2. In a decision of the Apex Court reported in (1996) 2 S.C.C. page No.384 (State of Punjab Vs. Gurmit Singh), the Apex Court has set out the

manner in which the evidence of a woman who is the victim of offence involving sexual molestation is to be appreciated. Perusal of paragraph no.8 read thus :

"...8.The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. **In cases involving sexual molestation,supposed considerations which have no material effect on the veracity of the prosecution case or been discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking**

corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion ? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-infliected, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a

guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice..."

(Emphasis supplied)

9. It will be also necessary to refer the recent decision of the Supreme court reported in A.I.R. 2002 S.C. page No.745 (State of Rajasthan Vs. Om Prakash) While reiterating that the conviction for offence under Section 376 can be based on sole testimony of the prosecutrix, the Apex Court in a paragraph No.19 of the said decision observed thus :

"19. Child rape cases are cases of perverse lust for sex where even innocent children are not spared in pursuit of sexual pleasure. There cannot be anything more obscene than this. It is a crime against humanity. Many such cases are not even brought to light because of the social stigma attached thereto. According to some surveys,d there has been a steep rise in child rape cases. Children need special care and protection. In such cases, responsibility on the shoulders of the courts is

more onerous so as to provide proper legal protection to these children. Their physical and mental immobility call for such protection. Children are the natural resource of our country. They are the country's future. Hope of tomorrow rests on them. **In our country, a girl child is in a very vulnerable position and one of the modes of her exploitation is rape besides other modes of sexual abuse. These factors point towards a different approach required to be adopted.** the overturning of a well considered and well-analysed judgment of the trial court on grounds like non-examination of other witnesses, when the case against the respondent otherwise stood established beyond any reasonable doubt was not called for. The minor contradiction of recovery of one or two underwears was wholly insignifant."

Lastly, it will be necessary to make useful reference to another decision of the Apex court reported in (2004) 8 S.C.C. page No.153 (State of H.P. vs. Shreekant Shekari). The Apex Court has laid down as to what should the approach of the Court while dealing with the sexual crime against the woman. In paragraph No.3 the Apex Court has observed thus :

"..3.The courts are, therefore, expected to deal with

> cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially sensitized Judge, in our opinion, is a better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos."

The Apex court has reiterated that the victim in such an offence stands on a higher pedestal than an injured witness. As stated earlier, there is a corroboration to the version of P.W.No.2 in the evidence of Santosh. In the cross examination of the father of the victim he has stated that he was desirous of withdrawing the case. Considering the present social structure, a desire to withdraw the case can be well understood.

10. In fact while permitting cross examination of the victim without declaring her as a hostile witness, the learned Judge recorded that her father is stating that he does not want to proceed. That is why the girl may not be telling the truth and therefore, the learned Judge was justified in permitting cross examination. That is how the witness narrated the incident. The courts below have appreciated the oral testimony of the prosecution witnesses and in particular P.W.no.2. It is very difficult to believe that the child

having age of 11 years was tutored. In fact her father had no reason to tutor her as he was not keen on prosecuting the accused. It is well settled that in a Revision Application, evidence cannot be re-appreciated. In my view, no fault can be found with the conviction of the applicant.

11. The learned Advocate for the Applicant strenuously urged that both the legs of the Applicant are affected by Polio and therefore leniency may be shown. In a case of heinous offence against a female child of sexual molestation, the Appellate Court has already shown leniency by reducing the conviction to six months from two years. On the contrary, in a case like this, strict approach is to be adopted as the offence is against dignity of womanhood. As the sentence is already reduced to six months from two years, I am not inclined to interfere. There is no merit in the revision application and the same is rejected.

JUDGE